IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 1372 OF 2005

PRUTHUKUMAR CHHABILDAS

KAPADIA & ORS. .. PETITIONERS

Vs.

DR. ARVIND RAGHAVJI KAPADIA .. RESPONDENT

Mr. D. J.. Khambatta with Shyam Mehta i/b M/s. Federal & Rashmikant for petitioners

Mr. Rajiv Patil with Wajid J. Shaikh for respondent

CORAM:-SMT. RANJANA DESAI, J.

DATED:-23/3/2005

P.C.

Rule. Respondent waives service. By consent of the parties taken up for hearing forthwith.

The petitioners are original defendants in R. A. E. Suit No. 775/1375 of 2001pending on the file of the Small Causes Court at Mumbai. The suit is filed by the respondent plaintiff who is the landlord for eviction of

the defendants on the ground of bonafide requirement. In this suit on 31/1/05, an application came to be made on behalf of the plaintiff that the plaintiff may be permitted to lead the evidence of Lalit Kapadia. By the impugned order the trial court allowed the said application and permitted the plaintiff to examine Lalit Kapadia on payment of costs of Rs.2500/- to the defendants. This order is challenged in this writ petition.

2. Before I deal with the rival submissions it is necessary to narrate few facts. Admittedly the evidence of the plaintiff commenced on 17/4/03. On 4/9/03 a letter came to be addressed by the plaintiff 's advocate to the defendants' advocate that the plaintiff shall examine in addition to the witness facing cross-examination, Mr. Bharat Kapadia, Mr. Lalit Kapadia and Mr. Raj Kapadia as their witnesses. Thereafter after the third witness was examined on 14/10/03, another letter came to be addressed by the plaintiff's advocate to the defendants' advocate stating that as Mr. Lalit Kapadia is not in a position to come to India immediately, it has been decided to close the evidence on behalf of the plaintiff. It was further stated that the plaintiff does not wish to examine any more witnesses and, therefore, on the next date the defendants may file the affidavit by way of examination-in-chief.

3. On 20/10/03 the learned Judge in his order noted as follows:-

> "The case is today for the evidence of other witnesses of the

plaintiff but the learned advocate for plaintiff stated that the plaintiff has closed their evidence. Case is adjourned for the evidence of the defendants to 4.11.2003 at 10.30 a.m.

4. It appears that in November, 2003, the defendants' evidence began and in December, 2004 the defendants' evidence got over. Admittedly on 16/12/04 the arguments commenced. Arguments were continued on 9/1/05 and 20/1/05.

5. On 31/1/05, the plaintiff filed instant application wherein it is stated that at the hearing of the suit the plaintiffs have filed a list of witnesses that they propose to examine in support of their case. The plaintiff wanted to examine Lalit Kapadia and adduce his evidence as regards his requirement. He was to come back to India some time in September/October, 2003. It is further stated that in December, 2001 it was observed that his wife Mrs. Anita Kapadia was having a mucus substance in her appendix, ovaries and fallopian tube which was discovered in explanatory surgery. After narrating the particulars about the health condition of Mrs. Kapadia, it is stated that in view of the ill-health of Mrs. Kapadia Mr. Lalit Kapadia could not come to India and after two major surgeries on Mrs. Kapadia, Mr. Lalit Kapadia has brought her to India. It is stated that Lalit Kapadia is one of the coparceners and as such is entitled to the suit property and a prayer is made that in view of

this the court may allow Lalit Kapadia to depose and adduce evidence in support of his case.

6. The trial court by the impugned order allowed the application. However, the trial court noted the submissions made on behalf of the defendants and observed that it was of the view that the objection of the defendants that if at this stage the plaintif is allowed to examine Lalit Kapadia then the defendants will be prejudiced is true. The trial court also observed that even though the evidence of the plaintiff and the defendants is closed and arguments of the defendants are concluded still it is proper to lead evidence of Mr. Kapadia, the witness who was cited in the list. The trial court further observed that this will definitely prejudice the defendants. Hence it is proper to compensate the defendants by awarding costs. Thus after noting that prejudice would be caused to the defendants the trial court awarded costs to the defendants and allowed the prayer of the plaintiff to examine Mr. Kapadia. The question is whether the trial court was right in allowing such a belated prayer after observing that prejudice would be caused to the defendants.

7. Prior to the amendment of the Code of Civil Procedure, Order XVIII Rule 2 read thus:

> "2. **Statement and production of evidence**.-(1) On the day fixed for the hearing of the suit or in on any other day to which

the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on the whole case.

(4) Notwithstanding anything contained in this rule, the Court may, for reasons to be recorded, direct or permit any pakrty to examine any witness at any stage."

8. Order XVIII Rule 17A read thus:-

"17.A. **Production of evidence not previously known or which could not be produced despite due diligence**.-Where a party satisfies the Court that, after the exercise of due diligence, any evidence was not within his knowledge or could not be produced by him at the time when that party was leading his evidence, the Court may permit that party to produce that evidence at a later stage on such terms as may appear to it to be just."

9. Therefore, prior to the amendment the trial court could at any stage for reasons to be recorded direct or permit any party to examine any

witness and the party had to merely satisfy the court that after the exercise of due diligence any evidence was not within his knowledge or could not be produced by him at the time when the party was leading his evidence and if the court were to be satisfied about the exercise of due diligence by such a party, the court could allow it to produce that evidence at a later stage on such terms as may appear to the court to be just.

10. Significantly after the amendment sub-clause (4) of Order XVIII Rule 2 has been deleted. Rule 17A has also been deleted. The legislative intent is, therefore, clear. It is no longer permissible to the court to allow a party to examine witnesses at any stage of the trial. This is obviously to ensure speedy disposal of cases and to prevent delaying tactics from being adopted.

11. Coming to the facts of this case it is clear from the record that on 14/10/03 the plaintiff had made it clear that they had decided to close the evidence and that they did not want to examine any more witnesses. They had intimated to the defendants that the defendants may file affidavit by way of examination-in-chief. On 20/10/03 the court in its order noted this fact. Thereafter the defendants' evidence began in December 2004. The defendants's closed their evidence. The arguments commenced and during the arguments the instant application came to be filed. It is, therefore, abundantly clear that the defendants have clearly indicated their case. To

allow the plaintiff to lead evidence at this stage, in my opinion, would undoubtedly mean allowing the defendants to fill up lacunae in their case.

12. The case made out by the plaintiff is that Lalit Kapadia's wife was seriously ill. She had cancer. Ordinarily sympathy of the court would be with such a person. But it is necessary to see whether really the illness of Mrs. Kapadia prevented the plaintiff from adducing the evidence. On 4/9/03, the plaintiff indicated that the plaintiff wanted to examine four witnesses i.e. Bharat Kapadia, Lalit Kapadia, Deepak Kapadia and Raj Kapadia in addition to the witness who was being cross-examined. In the application it is stated that in December, 2001 Mrs. Kapadia had suffered serious ailment. It is significant to note that in letter dated 14/10/03 it was not stated that the plaintiffs wanted some more time because Lalit Kapadia's wife was ill and Lalit Kapadia could not come to India. In fact in that letter it is clearly stated that the plaintiffs had decided to close the evidence and that plaintiffs did not wish to examine any more witnesses. If the plaintiffs really wanted Lalit Kapadia to be examined; if Lalit Kapadia's wife was seriously ill and, therefore, he could not come to Bombay, one would expect some averment to that effect in the letter dated 14/10/03. There are no such averments.

13. Mr. Patil learned counsel for the respondent contended that Lalit Kapadia is a co-parcener. It is necessary for him to depose about his

bonafide requirement and, therefore, in the interest of justice the trial court has granted the prayer of the plaintiffs and this court should not interfere with it. He submitted that Lalit Kapadia's wife was suffering from Cancer and, therefore, a kindly view of the matter will have to be taken. The learned counsel also drew my attention to Order XLI Rule 27 of the Code of Civil Procedure. He contended that even after the amendment the said provision continues to remain on statute. A party can produce additional evidence even at the appellate court and, therefore, there is no reason why a party should be prevented from adducing evidence at any stage in the trial, if the interest of justice so require. The learned counsel further contended that the plaintiff may be saddled with more costs but in the interest of justice the plaintiff may be allowed to examine Lalit Kapadia.

14. I am unable to agree with the learned counsel. In my opinion deletion of sub clause 4 of Rule 2 of Order XVIII and deletion of Rule 17A of Order XVIII are significant. This is aimed at preventing procrastination of litigation. It is true that under Order XLI Rule 27 evidence can be adduced at the appellate stage but in my opinion, from this it cannot be inferred that despite the deletion of the above mentioned two provisions the trial court can still allow the evidence to be led at any stage of the trial. In fact in my opinion, the fact that the legislature has deleted these two provisions and retained Order XLI Rule 27 indicates that

at the stage of trial a party should not be allowed to adduce evidence at any stage. This would be more so where the evidence of the plaintiff and the defendants is over and the arguments have commenced.

15. Even under Order XLI Rule 27 the court has to be cautious in allowing the prayers for adducing additional evidence. I may usefully refer to a decision of the Supreme Court in **N. Kamalam (Dead) & Anr. v. Ayyasamy & Anr., (2001) 7 S C C 503**, where the Supreme Court was considering the scope of Order XLI Rule 27. The relevant observations of the Supreme Court may be quoted:-

> Incidentally, the provisions of Order XLI Rule 27 have not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the court of appeal – it does not authorise any lacunae or gaps in evidence to be filled up. The authority and jurisdiction as conferred on to the appellate court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way. This Court in **Municipal Corpn. Of Greater Bombay v. Lala Pancham** has been candid enough to record that the requirement of the High Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment."
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> The Supreme Court further observed;

> "Needless to record that the courts shall have to be cautious and must always act with great circumspection in dealing with the claims for letting in additional evidence particularly, in the form of oral evidence at the appellate stage and that too, after a long lapse of time."

It is, therefore, apparent that the appellate court has also to be cautious and such prayers will have to be granted with great circumspection. In my opinion the plaintiff can not draw any support from order XLI Rule 27.

16. The learned counsel placed reliance on judgment of the Supreme Court in **Kewal Krishan v. Harnek Singh (Dead) by LRs. (2000) 9 SCC 117.** In that case evidence was closed. The Supreme Court set aside the order and permitted the appellant to lead his evidence. However, it appears that, that judgment refers to a case to which the provision of Order XVIII Rules 1 and 4 were applicable. In my opinion, that judgment will have to be distinguished from the facts of the present case. As observed by the trial court, the defendant would be greatly prejudiced if the plaintiff is allowed to lead evidence of Lalit Kapadia at this stage. It was wrong on the part of the trial court to grant the plaintiff's application after noting that prejudice would be caused to the defendants. In view of this the impugned order will have to be quashed and set aside. It is accordingly set aside.

17. The trial court shall proceed with the suit and dispose it of as

expeditiously as possible.

18. Parties to act on authenticated copy of this order.